SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-185

ANNA BURNS,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 26th, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Anna Burns, prays that a Writ of Certiorari issue to review the judgment entered on June 27th, 1973, by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee, against Prentiss McCollum, et al., Defendants-Appellants.

Opinion Below

The Petitioner's conviction was affirmed by the Circuit Court of Appeals without opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on June 27th, 1973. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Whether the Circuit Court of Appeals erred in sustaining Petitioner's conviction of a single conspiracy where proof at trial demonstrated that multiple conspiracies existed?

2. Was the trial court required, in its charge on conspiracy to violate Title 18, United States Code, Sections 2312 and 2313, to instruct the jury that they must find that the Petitioner had knowledge of the interstate transportation of the allegedly stolen automobiles?

Statutory Provisions

Title 18, United States Code, Section 371, provides in part as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 2312, provides as follows:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 2313, provides as follows:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Statement of the Case

The Petitioner, Anna Burns, was charged along with 20 other named defendants in a 30 count Indictment charging violations of Title 18, United States Code, Sections 2312, 2313, 2314, 371 and 2. Nine of these defendants including the Petitioner proceeded to trial to contest the Government's allegation that each had participated in a single conspiracy to steal, falsely register, sell and dispose of luxury automobiles in several states along the Eastern seaboard. The proof at trial, considered in the light most favorable to the Government, demonstrated the Petitioner's involvement with three different stolen motor vehicles which were allegedly transported into New Jersey.

John Vaden, an indicted co-conspirator who pleaded guilty, testified that during the term of the alleged conspiracy he participated, at the direction of the defendant McCollum, in the theft of automobiles which he subsequently transported to various states including New Jersey, Maryland and Washington, D.C. (T 58, 86, 111, 161 and 173)* With regard to the Petitioner, Vaden testified that

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* The letter "T" introduces reference to the trial transcript.

in October, 1970 he met the defendant Frank Jenkins, later described as the boy friend of the Petitioner, and agreed to transport a 1970 brown Lincoln to New Jersey. (T 111) This car, which Jenkins described as stolen was started by a screwdriver because the key device had been tampered with. (T 114) According to Vaden, the car was delivered in that condition to the home of the Appellant. (T 118-119)

The witness Vaden also described a subsequent incident a week and a half or two weeks later where the defendant Jenkins again requested Vaden to deliver another car to New Jersey. (T 136) Describing a similar procedure, with regard to another 1970 brown Lincoln bearing New Jersey license plates, Vaden stated that with this car also the ignition had been removed from the car and that a screwdriver had been inserted. On this occasion, however, the Lincoln was delivered to the parking lot of a restaurant near the George Washington Bridge. (T 140) It was there that the witness again encountered the Petitioner, Anna Burns. (T 141)

Cynthia Wharton, a co-conspirator witness, testified that her duties in the criminal enterprise involved the preparation and sale of fraudulent registrations for stolen cars. (T 657) Wharton testified that several of these fraudulent registrations were prepared in the name of the Petitioner at the request of the defendant, Jenkins. (T 687, 750 and 764)

Gerald Cooper, also a participant in the conspiracy, related that he had registered a stolen Ford van in the name of Anna Balcga, a pseudonym used by the Petitioner. (T 1343, 1355, 1965)

In addition to this testimony, more than 40 witnesses testified to various aspects of what was alleged to have been a wholesale distributorship of stolen cars. These witnesses included accomplices, victims of thefts, unknowing purchasers of these autos, law enforcement officials and Department of Motor Vehicle officials from New York, New Jersey, Washington, D.C. and Maryland. These witnesses gave no testimony relative to the alleged participation of the Petitioner, Anna Burns. Indeed, there was no evidence that the Petitioner's participation went beyond three vehicles specified above. Although two of these vehicles were found in the possession of the Petitioner by the New Jersey State Police, (T 2331, 2340) there was no proof that the Petitioner had knowledge of the object of the overall conspiracy charge.

Reasons for Granting the Writ

A. The Multiple Conspiracy Issue.

The Circuit Court of Appeals, by affirming the conviction below without opinion, has condoned what has become an all too frequent practice in our Federal District Courts. This is, joining individual defendants in mass trials with numerous defendants having significantly different roles of participation where one or more defendants have no knowledge or reason to know of a single overall conspiracy. With regard to the case of the Petitioner, Anna Burns, it is submitted, just such an instance exists.

As urged in the Court of Appeals, the proof in relation to the Petitioner was that she enjoyed a social relationship with the defendant, Frank Jenkins, who was shown to have

provided the Petitioner with two and possibly three allegedly stolen automobiles. There was absolutely no evidence that the Petitioner was more deeply involved in the overall conspiracy to steal, transport and distribute stolen vehicles.

The Court's decision in the instant case, it is submitted, is contrary to this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750 (1946). Both *Kotteakos* and the instant case involve the so-called "wheel" conspiracy where the only nexus between the substantive transactions is a common participant or participants. In the case at bar, the Petitioner was not shown to have been concerned with any other allegedly stolen car except the three registered in her name. Further, the Petitioner in no way was alleged to have aided in the procuring of stolen automobiles for other recipients. Therefore, each delivery of a stolen automobile was separate and distinct from all the others. The result is that the Government has proved a number of separate transactions or conspiracies rather than a single one. Petitioner urges that the common object of a number of conspiracies, in this case to steal and distribute automobiles, is insufficient to constitute a single overall conspiracy. *Blumenthal* v. *United States*, 322 U.S. 539 (1947). The resultant prejudice surfaced in the form of a multitude of incidents of criminal misconduct which did not involve the Petitioner. As the Circuit Court stated in *United States* v. *Branker*, 395 F. 2d 881 (2nd Cir., 1968),

> "The mounting proof of the guilt of the hub conspirators can reasonably be believed to have affected the Petitioner therein."

B. The Court's Charge.

In charging the jury on the law of conspiracy the trial court in the case at bar failed to instruct the jury that in order to convict the defendants of conspiracy, they must have found beyond a reasonable doubt that the defendants knew that the allegedly stolen automobiles had traveled in interstate commerce. *United States* v. *Vilhotti*, 452 F. 2d 1186 (2nd Cir., 1971); *United States* v. *Fields*, 466 F. 2d 119 (2nd Cir., 1972). The Government, in an apparent concession that this omission from the charge was error, argued below that the Petitioner was not substantially prejudiced and that "plain error" did not occur. RULE 52(b), FEDERAL RULES OF CRIMINAL PROCEDURE. Petitioner herein submits that this omission, although not brought to the attention of the trial court, was tantamount to omitting one of the essential elements of the conspiracy charge. For this reason, it is submitted that the jury could not have properly considered the elements necessary to return a conviction on the conspiracy charge.

The Petitioner, Anna Burns, adopts and urges each of the Points which may be asserted by her co-Petitioners in the United States Court of Appeals in their Petition to this Court for a Writ of Certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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GERALD L. SHARGEL
Of Counsel

July 26, 1973

APPENDIX

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of June one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD
HON. PAUL R. HAYS
HON. WILLIAM H. TIMBERS
Circuit Judges,

73-1378 73-1408 73-1453 73-1486

United States of America,
Plaintiff-Appellee,

v.

Prentis McCollum, Will W. L. Grissett, Ben Floyd Jr., Frank Jenkins, Fred Noel Grimes, Ana Burns, Dennis Burns, Donald Prince Shackelford, Willie Hudson, McNair, Annie Louise Wyche, Leonard Quick, Margaret McCollum, Vera Horne, James Blanton Elder, Robert Edward Quick, William Johnson, Holly B. Tyner, Christopher Miller, Samuel Collins, Edward Poe, Willie Albert Allen and Gilbert Reaves,

Defendants,

Prentis McCollum, Frank Jenkins, Ana Burns, Annie Louise Wyche,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

SUPREME COURT, U. S.
OCT 9

Nos. 73-185, 73-186 and 73-5179

In the Supreme Court of the United States

OCTOBER TERM, 1973

ANNA BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

PRENTISS MCCOLLUM AND ANNIE LOUISE WYCHE, PETITIONERS

v.

UNITED STATES OF AMERICA

FRANK JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
HENRY E. PETERSEN,
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-185

ANNA BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-186

PRENTISS MCCOLLUM AND ANNIE LOUISE WYCHE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-5179

FRANK JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1973. The petitions for writs of certiorari in Nos. 73-185 and 73-186 were filed on July 26, 1973, and the petition in No. 73-5179 was filed on July 25, 1973.

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced by the admission of evidence relating to counts dismissed by the court before sentencing (raised in Nos. 73-186 and 73-5179).

2. Whether the evidence showed multiple conspiracies rather than a single conspiracy (raised in Nos. 73-185 and 73-186).

3. Whether there was plain error in the trial court's instruction concerning knowledge by defendants that the vehicles in question had traveled in interstate commerce (raised in No. 73-185).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of conspiracy and (with the exception of petitioner Wyche) of substantive offenses involving interstate transportation, receipt and concealment of stolen motor vehicles, in violation of 18 U.S.C. 371, 2312 and 2313. Various sentences were imposed.[1] The court of appeals affirmed in a memorandum order without opinion (Pet. No. 73-186, App. A).

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[1] McCollum was sentenced to concurrent terms of imprisonment for five years, pursuant to 18 U.S.C. 4208(a)(1), on 14 substantive counts, and a fine of $5,000 and three years' probation for conspiracy, following service of his sentence on the substantive charges.

Jenkins received concurrent sentences of imprisonment for three years, pursuant to 18 U.S.C. 4208(a)(1), on eight substantive counts and a fine of $1,000 for conspiracy.

Co-defendant Vaden, who had pleaded guilty but had not yet been sentenced, testified as a government witness. According to Vaden's testimony, during the period of the conspiracy (September 25, 1969, to March 31, 1971) the basic pattern of operation was for petitioner McCollum to direct Vaden to steal a particular kind of car from the streets of New York City, which he would then do (Tr. 58, 63-68, 84). Following delivery of the stolen vehicle by Vaden, either McCollum or petitioner Jenkins would contact co-conspirator Wharton, also a government witness, who handled the preparation of false New York registration of the car (Tr. 686-706, 732-770, 1079-1120a). Vaden would deliver the vehicle to the out-of-state purchaser (Tr. 150-172).

During the month of October 1970, two 1970 Lincoln Continental cars were stolen in New York City (Tr. 2206-2208, 2504). Vaden delivered these cars to petitioner Burns in New Jersey. Both of them had broken ignition switches and had to be started by using a screwdriver (Tr. 109-144). Burns complained to Jenkins, who relayed the message to Wharton, that one of the Lincolns did not have a bogus plate to match the identification number on the registration supplied with the car (Tr. 753-754). A New Jersey state policeman located and seized one of these cars in New Jersey. Burns told the officer she bought the car for $4000 from a named party in New York (Tr. 2343-2350). The second Lincoln, which the officer had observed in Burns' driveway, was later seized at the residence of Burns' son (Tr. 2356-2361).

Burns received concurrent sentences of imprisonment for eighteen months, pursuant to 18 U.S.C. 4208(a)(1) on six substantive counts, sentence to be suspended on all but sixty days; in addition to which she was placed on probation for sixteen months.

Wyche received a suspended sentence for conspiracy and was placed on probation for one year.

Several circumstances inculpated petitioner Wyche in the conspiracy:

(a) In February 1971, Vaden stole a white Lincoln for McCollum. About a week later, Vaden went with McCollum, Wyche, and Wharton to where the Lincoln was parked and made an unsuccessful effort to get it started (Tr. 218-224).

(b) Defendant Grissett testified that he learned from McCollum in the summer of 1970 that McCollum dealt in "hot" cars and arranged to buy a white Lincoln Continental from him. He thereafter went with McCollum to Wyche's home (Tr. 536-542). Grissett, a resident of Washington, D.C., returned to New York shortly thereafter, meeting McCollum and Jenkins at Wyche's house. Arrangements were made to obtain a New York registration certificate and an affidavit of sale for the Lincoln. He stayed that night at Wyche's house (Tr. 587-593).

(c) In March 1971, Wharton and McCollum agreed to transport a stolen 1970 Cadillac from New York to North Carolina (Tr. 1119-1120). They met with two other parties at Wyche's home and talked about the trip in Wyche's presence. McCollum obtained from Wyche the keys to her garage and, with her consent, transferred the tags from her car to the stolen car (Tr. 1408-1410).

ARGUMENT

1. After the jury had returned its verdict finding McCollum, Jenkins and Burns guilty, *inter alia,* of transporting interstate falsely made securities, in violation of 18 U.S.C. 2314, but before sentencing, the Court of Appeals for the Second Circuit held in another case that New York State motor vehicle registration certificates were not securities within the meaning of

this statute. *United States* v. *Canton,* 470 F. 2d 861. Accordingly, the district court dismissed the counts involving the registration certificates and imposed sentences solely as to the remaining counts upon which a verdict of guilty had been returned.

Petitioners in No. 73-186 and No. 73-5179 urge that in these circumstances consideration by the jury of the evidence relating particularly to these counts was prejudicial. The short answer is that such evidence would have been admissible in any event at this trial. All the "securities" counts, with the exception of counts 21, 22, and 24, related to the obtaining of fraudulent registrations for vehicles whose interstate transportation (or receipt or concealment after such transportation) was alleged in other counts of the indictment (Tr. 2924-2937). Such evidence was therefore relevant to show knowledge and intent as to the related "car" counts. Cf. *United States* v. *Berlin,* 472 F. 2d 1002, 1009 (C.A. 2). As to counts 21, 22, and 24, the evidence was admissible to show knowledge, intent, common scheme or plan by unlawful acts of similar nature, especially in view of the close relationship in time and place. See, *e.g., United States* v. *Payne,* 467 F. 2d 828 (C.A. 5). As to these three counts, which applied only to McCollum, it may be added that the evidence of guilt on the part of this petitioner was overwhelming (*supra,* pp. 3-4).[2]

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[2] The factual situations in the cases upon which petitioners rely were quite different from that here presented. *United States* v. *Roach,* 321 F. 2d 1 (C.A. 3), a bank robbery case, involved an aggregation of errors. The court held, under *Milanovich* v. *United States,* 365 U.S. 551, that the conceded impropriety in instructing the jury on one of the counts constituted one of the several reasons for requiring a new trial. *United States* v. *Calhoun,* 257 F. 2d 673 (C.A. 7), involved reception of a large volume of evidence against all defendants which was admissible only upon a theory of conspiracy, but the charge of conspiracy was fatally defective because it omitted the essential element of

2. Petitioners in No. 73-185 and No. 73-186, relying on *Kotteakos* v. *United States,* 328 U.S. 750, argue that the evidence established separate conspiracies. In *Kotteakos* it was held that the evidence showed eight or more separate and distinct conspiracies, the only nexus among them being that one man participated in them all. Such is not the case here.

In this case there was a pattern of criminal activity with McCollum and Jenkins as the ringleaders (*supra,* p. 3). The participation of Anna Burns and Annie Louise Wyche, while of less importance, was central to this activity. The relationship of other defendants who did not appeal, their acquaintanceship with the other parties or their knowledge of the purposes of the scheme is of no significance so far as these petitioners are concerned. Cf. *Blumenthal* v. *United States,* 332 U.S. 539. With respect to petitioner Burns, who places particular emphasis on this contention, the evidence of her guilt under the substantive counts was overwhelming and the light sentence imposed was concurrent as to all counts—both substantive and conspiracy. Accordingly, this Court need not consider contentions relating to the conspiracy count. See *Barnes* v. *United States,* No. 72-5443, decided June 18, 1973, slip op. 8-9, n. 11.

3. Petitioner Burns urges, without identifying any particular part of the charge, that the court "failed to

scienter. In *Cross* v. *United States,* 335 F. 2d 987 (C.A. D.C.), charges of robbing a church rectory and of robbing a tourist home some two and a half months later were tried together, over the protests of one defendant, who wished to remain silent as to one charge but to testify as to the other. When separate trials were denied, this defendant testified as to both charges, winning acquittal on the one as to which he wished to testify, but apparently hurting himself and his co-defendant on the charge as to which he remained silent. A new trial was ordered as to both defendants. The distinguishing feature about the present case is that the evidence received having particular relevance to the "securities" counts was, for the reasons above stated, also relevant and entirely proper as to the "car" counts, so that petitioners were in no way prejudiced.

instruct the jury that in order to convict the defendants of conspiracy, they must have found beyond a reasonable doubt that the defendants knew that the allegedly stolen automobiles had traveled in interstate commerce" (Burns Pet. 7). No such objection was made at trial. Moreover, the court gave such an instruction (Tr. 2921, 2930, 2931, 2937-2938, 2939, 2940, 2942). There was no error, much less plain error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1973.

DOJ-1973-10